REPORT ON LEGAL OPINIONS CONCERNING CALIFORNIA PARTNERSHIPS (FEBRUARY 1998)

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REPORT ON LEGAL OPINIONS CONCERNING CALIFORNIA PARTNERSHIPS

February 1998

By the
Partnerships and Limited Liability Companies Committee
of the Business Law Section of the State Bar of California

This Report is a commentary on written opinions concerning California partnerships (both general and limited) by the Partnerships and Limited Liability Companies Committee of the Business Law Section of the State Bar of California.[1] Existing published reports on legal opinions in business transactions generally assume that the entity being opined upon is a corporation and do not attempt to address the issues that arise if the entity is a partnership. Current legal opinion practice often does not address the characteristics that make a partnership different from a corporation but instead has tended simply to substitute the word "partnership" for "corporation" in the opinion. This Report is intended to assist practitioners in requesting and rendering meaningful opinions concerning California partnerships by addressing differences between partnerships and corporations and suggesting language that better reflects those differences.

This Report is limited to consideration of those issues that are unique to legal opinions given with respect to California partnerships and is not a general treatment on opinion letters. In that regard, readers are referred to the 1989 Report of the Committee on Corporations of the Business Law Section of the State Bar of California Regarding Legal Opinions in Business Transactions (August 1989) (the "Corporations Report"); the Third-Party Legal Opinion Report including the Legal Opinion Accord (the "Accord") of the Section of Business Law, American Bar Association (1991) (the "ABA Report"); and the Business Law Section of the State Bar of California Report on the Third-Party Legal Opinion Report of the ABA Section of Business Law (May 1992) (the "California Report").[2]

The laws specifically addressed in this Report are the California Uniform Partnership Act ("CUPA"),[3] the California Uniform Partnership Act of 1994 ("RUPA")[4] the California Uniform Limited Partnership Act (the "Original Act"),[5] and the California Revised Limited Partnership Act (the "Revised Act"). [6] Statutory and rule changes through February 1998 are covered, as are key decisions published through mid-December 1997.

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1. This Report does not address issues involving general partnerships which have registered as limited liability partnerships pursuant to Cal. Corp. Code §§ 15047-15058 (repealed effective January 1, 1999) or 16951-16962 (West 1998).

2. See also State Bar of California, Business Law Section Report Regarding Legal Opinions in Personal Property Secured Transactions (December 1988); State Bar of California, Real Property Law Section and Los Angeles County Bar Ass'n., Real Property Section, Legal Opinions in California Real Estate Transactions (1987 and Addendum 1990) (the Business Law Section has republished these reports and the Corporations Report in a pamphlet entitled 1990 California Opinion Reports); State Bar of California, Real Property Section and Los Angeles County Bar Ass'n., Real Property Section, 1995 California Real Property Legal Opinion Report, 13 Cal. Real Prop. J. I (Fall 1995).

3. Cal. Corp. Code §§ 15001 - 15046 (West 1998) (repealed effective January 1, 1999). 4. 5.

4. Cal. Corp. Code 16100 - 16962 (West 1998).

5. Cal. Corp. Code 15501 - 15553 (West 1998). Certain provisions of the Original Act continue to apply to limited partnerships that were formed before July 1, 1984 but which have not elected to be governed by the Revised Act.

6. Cal. Corp. Code % 15611 - 15723 (West 1998).

ACKNOWLEDGMENTS

This Report is the result of a project of the Partnerships and Limited Liability Companies Committee of the Business Law Section of the State Bar of California. The Committee is made up of California practitioners who as a regular part of their practice render and receive legal opinions concerning California partnerships in business transactions. This Report is the result of the efforts of the individuals below. The views set forth in this Report reflect a consensus among the current members of the Committee but do not necessarily reflect the positions of individual members or their respective firms or organizations. This Report has not been considered or approved by the State Bar of California or by its Business Law Section.

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THE IMPERFECT ANALOGY OF PARTNERSHIPS TO CORPORATIONS

The current major reports dealing with opinions relating to the entity in a business transaction address only corporations. These reports have generally disclaimed any attempt to address opinions relating to partnerships as entities.

Not surprisingly, therefore, many practitioners, when requesting specific language for, or giving, an opinion regarding a partnership, use the same language they would use for a corporation and merely substitute the word "partnership." Practitioners have grown accustomed to speaking of partnerships with the same vocabulary as they use for corporations, referring to concepts such as "duly formed," "duly organized," "validly existing," "in good standing," "legally issued," etc.

Corporations differ from partnerships in many ways. A corporation is an entity created entirely by statute. These statutes generally limit the power of shareholders to electing a board of directors and approving certain fundamental matters concerning the corporation. The board of directors generally does not act on behalf of the corporation, but delegates that power to the officers. To preserve the limited liability of the shareholders, the corporation must keep separate accounts and must observe the "corporate formalities" to emphasize that the corporation is a separate legal entity, distinct from its owners.

A partnership is in many respects the opposite of a corporation. Historically, a partnership was not considered to be a separate legal entity.[7] The term "partnership" merely described the legal relationship among the partners and the consequences of agreeing to carry on a business for profit as co-owners. RUPA now provides that a partnership is "an entity distinct from its partners."[8] Even so, a partnership's powers derive not from a statute but from the partners. The partners are generally free to make whatever rules for their internal governance they desire. With a few exceptions, the laws that govern partnerships apply only when the partners have failed to make some other arrangement.

Since partnerships differ from corporations, it is sometimes difficult to render an opinion about a partnership using the vocabulary of corporations. Nevertheless, there is an established practice of using corporate concepts to describe partnerships in written opinions. Accordingly, this Report recommends language that uses the vocabulary of partnerships and, where such language is different than the vocabulary of corporations, explains the differences.

OPINIONS

This Part of the Report addresses terminology commonly used in opinions relating to California partnerships as entities and to their authority to transact business. The Report assumes that the opinion recipient is a potential lender to a partnership, a potential partner, or a potential purchaser of a partnership's business or assets. The Report identifies the typical concerns of such an opinion recipient; suggests language appropriate for addressing those concerns; identifies and distinguishes any different corporate vocabulary used to address the same concerns; and identifies the research and investigation counsel normally performs in rendering the relevant opinion.

A. TRANSITION ISSUES.

RUPA governs all partnerships (general and limited) formed on or after January 1, 1997 other than a partnership that carries on the business of a partnership that was formed before January 1, 1997 following its predecessor's dissolution.[9] RUPA also governs all partnerships (general and limited) formed before January 1, 1997 that elect to be governed by RUPA." [10] Beginning January 1, 1999, RUPA will govern all partnerships (general and limited), regardless of when they were formed".[11]

7. Sonberg v. Bergere, 220 Cal. App. 2d 681, 34 Cal. Rptr. 59 (1963) ("Except under exceptional circumstances, and there are none here, a partnership is not recognized as a distinct entity separate from its members (Reed v. IndustrialAcc. Com., 10 Cal. 2d 191, 73 R 2d 1212, 114 A.L.R. 720), and cases there cited.").
8. CAL. CORR CODE § 16201 (West 1998).
9. CAL. CORP. CODE § 16111 (a) (West 1998).
10 Id.
11. CAL. CORP. CODE §§ 155090), 15722, and 16111 (b) (West 1998).

Whether a partnership is governed by RUPA or CUPA generally does not affect the analysis of the law counsel performs when rendering a legal opinion concerning a California general partnership. However, the ability of a general partnership governed by RUPA and its partners to file statements of authority, denial, dissociation, dissolution, conversion, and merger with the California Secretary of State changes some of the investigation that counsel normally performs when rendering certain opinions.

Election to be Governed by RUPA. A partnership elects to be governed by RUPA "in the manner provided in its partnership agreement or by law for amendment of the partnership agreement."[12] None of CUPA, the Original Act, or the Revised Act contains any provision gove rning the amendment of partnership agreements, so unless the partnership agreement provides otherwise, under general contract law principles the vote to elect to be governed by RUPA would have to be unanimous.[13] Normally, the election would be in the form of an amendment to the partnership agreement itself.

B . STATUS OF THE PARTNERSHIP.

Opinion recipients normally want to identify the type of the entity with, which they are dealing and confirm that the entity is a legal person. An opinion that addresses this concern is typically referred to as a "status opinion." Analysis of the status of a general partnership is different from the analysis of the status of a limited partnership, and this portion of the Report will treat the entities separately.

1. General Partnerships.

Recommended Wording of the Status Opinion. The Committee recommends the following wording for an opinion regarding the status of a general partnership:
The [name of entity] is a general partnership under the laws of the State of California.

Contrast with Corporate Status Opinion. A common corporate status opinion reads as follows:
The [name of entity] is a corporation that has been *duly formed and organized* and is *validly exist ing and in good standing* under the laws of the State of California.

In the Committee' s view, none of the italicized phrases in the common corporate status opinion assists in understanding the status of a general partnership.

"*Duly Formed and Organized*." With respect to a corporation, the phrase "duly formed and organized" means that the corporation has filed certain documents (articles of incorporation) with the Secretary of State and has taken certain steps relating to its internal organization, as required by statute.[14]

In contrast, California law does not set forth any steps that partners must take to create a general partnership. Instead, CUPA and RUPA merely recognize that a general partnership exists when two or more persons associate to carry on a business for profit as co-owners and they have not formed an entity under any other statute of California or of any other jurisdiction.[15] RUPA makes clear that which was implicit under CUPA, which is that a partnership may exist "whether or not the persons intend to form a partnership."[16] There is no requirement to file any document with any governmental agency [17] or to enter into a written partnership agreement to organize a partnership.

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12. CAL. CORP. CODE § 16111 (a) (West 1998).

13. See CAL. CORP. CODE § 155250)(b) (West 1998), which requires amendments to the long-form certificate of a limited partnership governed by the Original Act to be signed by "all members"; CAL. CORP. CODE § 15712(b)(1)(West 1998), which provides that an election by a limited partnership governed by the Original Act to be governed by the Revised Act must be made by "the written consent of all of the partners, or of the lesser number provided in the partnership agreement for this election"; and CAL. CORP. CODE § 16401(j) (West 1998), which requires amendments to a partnership agreement governed by RUPA to be unanimous unless the partners have provided otherwise in the partnership agreement pursuant to CAL. CORP. CODE § 16103.

14. See Corporations Report §§ V.A. I and V.A. 2.

15. CAL. CORP. CODE §§ 15006 (repealed effective January 1, 1999) and 16201 (West 1998).

16. CAL. CORP. CODE § 16201 (West 1998).

17. RUPA permits a general partnership to make certain filings with the California Secretary of State. These filings are optional, and the failure to make a filing does not affect the existence of the partnership. The filings that may be made under RUPA are listed at CAL. CORI). CODE § 1610105) (West 1998).

Thus, if there is a general partnership, it is necessarily duly formed and duly organized. An opinion that a general partnership is "duly formed" or "duly organized" cannot have the same meaning for a general partnership as it has for a corporation. If used, the phrase should be understood to mean only that there is nothing required of the general partnership to complete its formation or organization. A duly-formed-and-organized opinion does not require any investigation or research once counsel has concluded that the entity is a general partnership, nor does the phrase imply that any such research has been performed.

"*Validly Existing*." With respect to a corporation, the phrase "validly existing" is generally understood to mean that the corporation has not dissolved or ceased to exist by reason of a merger or the operation of a limitation on the duration of its existence in its articles of incorporation.[18] The opinion further implies that no dissolution proceedings have commenced.[19] Thus, there are circumstances where counsel would not normally give an unqualified "validly existing" opinion regarding a corporation, even though the law may clearly provide that the corporation does exist. For example, the General Corporation Law provides that a corporation continues to exist, even after it has filed a certificate of dissolution, for the purpose of "winding up its affairs, prosecuting and defending actions by or against it and enabling it to collect and discharge obligations, dispose of and convey its property and collect and divide its assets.[20] This is notwithstanding the fact that the certificate of dissolution filed with the Secretary of State certifies that the affairs of the corporation have been completely wound up.[21] Because corporations enjoy perpetual existence and dissolution is a deliberate, formal process, counsel for a corporation is expected to take an exception to a status opinion if dissolution proceedings have begun.

The law of "existence" is much the same for a general partnership as for a corporation. A general partnership does not cease to exist as the result of the operation of a limitation on its term set forth in a partnership agreement. Expiration of the term of a general partnership means only that the general partnership has dissolved. Once a partnership dissolves, it must wind up its affairs and distribute its assets unless the partners agree to continue the business of the partnership where the partners are authorized by law to do so.[22] Dissolution limits the power of the partners to act on behalf of the partnership other than in connection with the winding up of business or completing transactions begun but not then finished .[23] The power of the partners to act on behalf of a partnership is not included in a status opinion. (See the discussion concerning the power-to-conduct-business opinion and the due-authorization-of-the-agreement opinion below.) A general partnership does not cease to exist until it has completed the winding up process .[24] Therefore, it is the view of the Committee that it is not appropriate to take an exception to a status opinion to reflect that the partnership may have dissolved. While dissolution may be an important issue, it is important because it affects the power and authority of the general partnership to conduct its business or to enter into a transaction, which is normally the subject of separate opinions. These opinions are where the issue of dissolution is appropriately addressed. The impact of dissolution on the power and authority of a general partnership is therefore discussed below.

With respect to a corporation, the word "validly" is used to distinguish a "*defacto*" corporation from a "*de jure*" corporation .[25] *The defacto / dejure* distinction does not apply to general partnerships.

An opinion that an entity is "existing" or "validly existing" therefore cannot have the same meaning for a general partnership as for a corporation. If used, the phrase(s) should be understood to mean only the general partnership has not terminated or been merged or converted into another entity. [26]

18 Corporations Report § V.A.3.

19 Id.

20 CAL. CORP. CODE § 2010 (West 1998).

21 CAL. CORR CODE § 1905 (West 1998).

22 RUPA provides that the partners may not vary the requirement to wind up the partnership business under the circumstances specified in paragraphs (4), (5), and (6) of CAL. CORP. CODE § 1660 1. CAL. CORP. CODE § 16103 (B) (8) (West 1998).

23 CAL. CORP. CODE 15030 and 15033 - 15035 (repealed effective January 1, 1999) and 16801 - 16804 (West 1998).

24 CAL. CORP. CODE 15030 (repealed effective January 1, 1999) and 16802(a) (West 1998).

25 See Corporations Report § V.A.3.

26 CAL. CORP. CODE §§ 16902 and 16910 (West 1998).

"*In Good Standing*." With respect to a corporation, the phrase "in good standing" means that the corporation's charter has not been suspended or forfelted.[27] An opinion as to the good standing of a corporation may be based solely on a certificate of status from the Secretary of State. The continued existence of a general partnership does not depend on any required filing with a state agency.

General partnerships are not subject to any adverse consequence, such as suspension of powers, for failing to meet any statutory requirement. Moreover, the Secretary of State does not issue certificates of status for general partnerships.

An opinion that an entity is "in good standing" therefore cannot mean the same with respect to a general partnership as it does with respect to a corporation. If used, the phrase should be understood to mean only that the partnership's power to act as a legal person has not been suspended. In that sense, a California general partnership is always in good standing. Once counsel has concluded that an entity exists as a general partnership under California law, counsel need not perform any further research or investigation to conclude that the partnership is in good standing.

Elements of the Status Opinion. The consensus of the Committee is that the elements of a status opinion for a general partnership are as follows:

1. Two or more persons have associated to carry on as co-owners a business for profit.[28]

2. The entity is not a California limited, special, or mining partnership,[29] corporation, limited liability company, or trust, or any other entity formed under any statute of the State of California other than RUPA or its predecessor.[30]

3. The entity is not a registered limited liability partnership .[28]

4. The entity is not a limited partnership,[29] corporation, limited liability company, trust, or other entity formed under any statute of a jurisdiction other than the State of California that is not comparable to RUPA.[32]

5. The entity has not been merged or converted into another entity.

Investigation. Counsel ordinarily confirms the elements of a status opinion by reviewing a copy of the signed partnership agreement, if there is one, and obtaining a certificate of one or more of the partners that the copy of the partnership agreement is true and complete, with all amendments.[33] Although intent is not necessary to form a partnership, the written partnership agreement will normally indicate that the parties did intend to form a partnership and that they are carrying on a business as co-owners. In addition, the partnership agreement will frequently identify the law that the parties intend to govern, which counsel may consider in concluding that laws other than CUPA or RUPA do not apply to the formation of the entity.

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27 See Corporations Report § VA.4.

28 CAL. CORP. CODE §§ 15006 (repealed effective January 1, 1999) and 16202(a) (West 1998).

29 This Report does not include any discussion concerning special or mining partnerships, which are distinguished from general and limited partnerships in CAL. CORP. CODE § 15006(2) (repealed effective January 1, 1999) (West 1998).The California statutes concerning special partnerships, CAL. CIV. CODE % 2477-2610, were repealed with the adoption of the Uniform Partnership Act (CAL. CORP. CODE §§ 15001 - 15046 (West 1998)) in 1929. There is no other reference to a "special" partnership in any of the California Codes other than CAL. CORP. CODE % 15006(2) and 15044, both of which have been repealed effective January 1, 1999. Special provisions concerning mining partnerships are set forth in the CAL. PUB. RES. CODE % 2351 et. seq. (West 1998).

30 Id. See also CAL. CORP. CODE § 15044 (West 1998) (repealed effective January 1, 1999).

31 Technically, a registered limited liability partnership is a general partnership. Nevertheless, it could be material to an opinion recipient to know that a partnership is an LLP. Accordingly, if a general partnership is an LLF, the opinion should make a reference to that fact.

32 CAL. CORP. CODE §§ 15006 (repealed effective January 1, 1999) and 16202(b) (West 1998). Section 15006 of CUPA provides that an entity formed under the laws of another state may nevertheless be a partnership if such an entity would have been treated as a partnership under California law before the adoption of CUPA in 1949. Section 16202 of RUPA does not contain any comparable provision.

33 Section 3 of the Accord, which the Committee believes is generally consistent with non-Accord practice, governs the use of client certificates to establish the facts on which an opinion is based. In this regard, Section 3(b) of the Accord states that an opinion giver may not rely on statements of a legal conclusion at issue in a client certificate. Counsel should be mindful of Commentary 13.1 of the Accord, which cautions against relying on "conclusory assertions" in client certificates without supporting information to justify the assertion.

If counsel is unable to review a copy of the signed partnership agreement or there is no written partnership agreement, counsel may ascertain the existence of the partnership by reviewing a certificate signed by a partner that recites that the partners are carrying on a specified business as partners or co-owners.[34]

Obtaining a certificate from at least two partners provides additional assurance that a partnership exists, since the certificate can itself act as a written partnership agreement. Given the opportunity, many counsel prefer to have all of the partners sign the certificate. In some cases, however, obtaining the signature of each partner is not practical. The Committee believes that current practice, with respect to both Accord and non-Accord opinions, permits counsel to rely on a certificate of fewer than all of the partners, or only a single partner, if counsel does not know of facts that make reliance on such a certificate unreasonable .[35]

If the partnership is governed by RUPA, counsel also determines whether any statement of conversion [36] or merger [37] has been filed with the California Secretary of State.

Choice of Law. Counsel may assume that California law governs if the partnership agreement is silent as to choice of law or specifically provides that California law governs. Counsel normally verifies that the partnership agreement does not provide that the partnership is governed by the law of a state other than California and that there are no other circumstances that would make it unreasonable to assume that California law applies. The Committee is unaware of any case law in California on the question of choice of law in connection with the formation of a partnership.

If the partnership is governed by RUPA, counsel also verifies that the partnership has its chief executive office in California. RUPA provides that California law applies if the partnership has its chief executive office in California. [38] RUPA does not, however, prohibit the partnership agreement from providing that the partnership will be governed by the law of another jurisdiction.[39]

Normally, California attorneys do not give opinions on choice of law.[40] The enforceability of a choice of law provision that selects the law of a state other than California, or that selects California law when the partnership is governed by RUPA and has its chief executive office located outside California, is beyond the scope of this Report. If an opinion recipient desires an opinion concerning choice of law, such an opinion must be specifically requested.

Assumptions. In rendering a status opinion, unless the parties agree otherwise, the opinion giver is entitled to rely on the following assumptions which are specific to general partnerships. These assumptions are in addition to other assumptions, such as the validity of signatures, which also apply in other contexts.[41] These assumptions are not normally expressly stated in the written opinion letter. The assumptions are:

(a) If there is a signed agreement that recites that the entity is a general partnership, the entity has not been formed as a different kind of entity.

(b) If there is no signed partnership agreement but the partners say they are partners in a general partnership (or that they are carrying on as co-owners a business for profit), the entity has not been formed as a different kind of entity and is not a special or mining partnership.[42]

34 Counsel should exercise caution when rendering an opinion with respect to an oral partnership. Without a written agreement, it may be difficult for counsel to establish material terms of the agreement among the partners. See also Kaljian v. Menezes, 36 Cal. App. 4th 573, 42 Cal. Rptr. 2d 510 (1995) (it was prejudicial error to fail to instruct the jury that the statute of frauds applies to an agreement between the members of a joint venture to transfer an interest in real property).

35 See Accord § 5.

36 CAL. CORP. CODE § 16906 (West 1998).

37 CAL. CORP. CODE § 16915 (West 1998).

38 CAL. CORP. CODE § 16106 (West 1998).

39 CAL. CORP. CODE § 16103 (West 1998).

40 See fn. 18 of the California Report. See also Accord § 10(b), which provides that a remedies opinion "is given as if the Law of the Opining Jurisdiction governs the Transaction Document, without regard to whether the Transaction Document so provides."

41 For a discussion of the use of express and implicit assumptions in opinion letters, see Corporations Report pp. 17-19 and Accord 4.

42 Counsel should exercise caution when rendering an opinion with respect to an oral partnership. Without a written agreement, it may be difficult for counsel to establish material terms of the agreement among the partners.

(c) The activity in which the partnership is engaged is a business; the activity is being carried on for profit; and each of the partners is a co-owner of the business.

(d) The partners have the legal capacity or entity power and authority to carry on the business of the partnership in their individual capacities.

(e) California law governs if the partnership agreement is silent as to choice of law or specifically provides that California law governs and, if the partnership is governed by RUPA, the chief executive office of the partnership is located in California.

The Dissolved and Reconstituted Partnership. If an event of dissolution has occurred with respect to a general partnership but the partners have continued the business as if the partnership had not dissolved, the original partnership is deemed to have terminated and the remaining partners are deemed to have formed a new partnership on the same or substantially the same terms as the old partnership.[43] In that situation, counsel normally verifies that the transaction documents correctly identify the partnership that is the subject of the legal opinion and considers whether the dissolution and reconstitution of the partnership is material to the transaction. Depending on the circumstances, counsel may obtain a certificate of the partners confirming that (a) none of the partners (i) has acted to wind up the partnership's affairs pursuant to Section 15037 of CUPA or Section 16801 or RUPA or (ii) has demanded that his or her partnership interest be redeemed for cash pursuant to Section 15038 of CUPA or Section 16701 of RUPA and (b) the partners have continued to carry on as co-owners the business of the partnership for profit.

The Defectively Formed Limited Partnership. If a limited partnership is not formed in accordance with law, it is probably a general partnership.[44] Nevertheless, as one law firm learned to its sorrow, it is not sufficient to opine that an entity is a general partnership if in fact it is an improperly formed limited partnership. In that circumstance, where the opinion is being given to a potential creditor of the partnership, counsel also has a duty to disclose that some of the general partners may believe that they are not general partners. This is because a creditor would be put to additional litigation expense in establishing the status of the general partners if it were necessary to seek repayment from them, and faced with such facts a potential creditor might choose not to extend credit. Those were the facts in the case of *Roberts v. Ball, Hunt, Hart, Brown and Baerwitz*., 57 Cal. App. 3d 104, 128 Cal. Rptr. 901 (1976), in which the court observed at 128 Cal. Rptr. 906 as follows:

Defendants assert that the opinion that the BBC partners were general rather than limited is not alleged by plaintiff to be incorrect, and, hence, that no breach of duty is alleged. But the essence of plaintiff's causes of action sounding in negligence is that defendants knew about ... the contention of certain partners that they were limited partners, only, and knowingly failed to reveal that doubt to plaintiff. Even though defendants may have believed that there was a general partnership in spite of the claims of some of the general partners, the firm had a duty to reveal to plaintiff this doubt as to the status of the partnership as a general partnership, since the firm knew that disclosure of this doubt might well be determinative of plaintiff's decision to make loans to BBC.

The effect of the court's opinion was to reverse the trial court's dismissal after sustaining the defendant's demurrer. In the dissent, it is noted that the plaintiff alleged that the law firm delivered the opinion at the request of the general partners. The dissent maintained that the law firm was therefore justified in assuming that whatever disputes had existed among the general partners had been resolved and had no obligation to report the earlier doubts to the plaintiff.

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43 The partners will be deemed to have done this by virtue of their actions alone. No specific documentation is necessary to reconstitute a partnership, although documentation is beneficial for all the reasons that agreements are normally put in writing. CAL. CORP. CODE § 15406(b) (West 1998). See aAo CAL. CORP. CODE § 15041 (West 1998) (repealed effective January 1, 1999) and the reference thereto in Section 16111 (a) of RUPA. But, for partnerships subject to RUPA, see CAL CORP. CODE § 16103(B)(8) (West 1998), which provides that the partners may not vary the requirement to wind up the partnership business under the circumstances specified in paragraphs (4), (5), and (6) of CAL. CORP. CODE § 16601.

44 CAL. CORP. CODE §§ 15006 (repealed effective January 1, 1999), 15044 (repealed effective January 1, 1999), and 16202 (West 1998). American Alternative Energy Partners 11, 1985 v. Windridge, Inc., 42 Cal. App. 4th 551, 49 Cal. Rptr. 2d 686, 692 (1996) (defectively formed limited partnership was a general partnership). See also Tiburon Nat. Bank v. Wagner, 265 Cal. App. 2d 868, 71 Cal. Rptr. 832 (1968).

2. Limited Partnerships.

Recommended Wording of Status Opinion. The Committee recommends the following wording for a status opinion for a limited partnership:

> [Name of entity] is a duly formed limited partnership and is existing in good standing under the laws of the State of California.

Contrast with Corporate Status Opinion. The recommended wording includes the phrases "duly formed," " existing," and "in good standing," which address issues that exist for limited partnerships but not for general partnerships.

"Duly Formed" and "Duly Organized." As previously observed, with respect to a corporation, the phrase "duly formed and organized" means that the corporation has filed certain documents (articles of incorporation) with the Secretary of State and has taken certain steps relating to its internal organization, as required by statute.[45] The Revised Act expressly states that to "form" a limited partnership the general partners must execute, acknowledge, and file a certificate of limited partnership with the Secretary of State and all of the partners must enter into a partnership agreement, written or oral, either before or after the certificate is filed. It then goes on to state, however, that a certified copy of the certificate of limited partnership is "conclusive evidence" of the formation of the partnership and prima facie evidence of its existence. [46] Thus, an opinion that a limited partnership is "duly formed" means only that a certificate of limited partnership has been filed with the Secretary of State with respect to the limited partnership.

The phrase "duly organized" has no additional meaning with respect to a limited partnership. The Revised Act does not use any form of the term "organized" with respect to a limited partnership, although the General Corporation Law does use the phrase "perfect the organization" with respect to a corporation.[47] If used, the phrase should be understood to mean only that the limited partnership is "duly formed."

"Existing. " As previously stated, the phrase "existing" with respect to a corporation means that the corporation has not dissolved or ceased to exist by reason of a merger or the operation of a limitation on the duration of its existence in its articles of incorporation.[48]

A limited partnership's existence is terminated as a matter of official record only when the limited partnership files a certificate of cancellation or merges out of existence. Dissolution, by itself, does not affect the existence of a limited partnership. Therefore, it is the view of the Committee that it is not appropriate to take an exception to a status opinion to reflect that the limited partnership may have dissolved. While dissolution may be an important issue, it is important because it affects the power and authority of the limited partnership to conduct its business or to enter into a transaction, which is normally the subject of separate opinions. These opinions are where the issue of dissolution is appropriately addressed. The impact of dissolution on the power and authority of a limited partnership is discussed below.

As previously stated, the word "validly" is used with respect to a corporation to distinguish a "*defacto*"corporation from a "*dejure*" corporation.[49] The *defacto/dejure* distinction does not apply to limited partnerships.

An opinion that an entity is "existing" or "validly existing" therefore should not have the same meaning for a limited partnership as for a corporation. Thus, an opinion that a limited partnership is "existing" or "validly existing" means only the limited partnership has not filed a certificate of cancellation or been merged out of existence.

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45 See Corporations Report §§ VA. 1 and VA.2.

46 CAL. CORP. CODE 15621 (a) and 15621 (c) and 15712(b) (2) (West 1998). See Section 111.A.2. - Limited Partnerships Formed Before July 1, 1984.

47 CAL. CORP. CODE 210 (West 1998).

48 Corporations Report § VA.3.

49 See Corporations Report § VA-3-

"*In Good Standing*." As previously observed, with respect to a corporation, the phrase "in good standing" means that the corporation's charter has not been suspended or forfeited.[50] The opinion with respect to a corporation may be based solely on a certificate of good standing from the Secretary of State. The Secretary of State will issue a certificate of good standing for a limited partnership if the limited partnership has not filed a certificate of cancellation or been merged out of existence.

A limited partnership files a certificate of cancellation when it has wound up its affairs and distributed its assets.[51] Although a limited partnership must pay an annual franchise tax comparable to the minimum franchise tax payable by corporations,[52] the failure to pay the tax does not result in suspension or forfeiture of the limited partnership's charter or any of its rights or powers.[53] Thus, an opinion that a limited partnership is "in good standing" is the same as an opinion that the limited partnership is existing.

A "good standing" opinion may be based solely on a certificate of status issued by the Secretary of State or solely on a copy of the certificate of limited partnership certified by the Secretary of State with all subsequent filings, none of which is a certificate of cancellation or merger.[54] The opinion does not require any investigation or research once counsel has concluded that the entity has not filed a certificate of cancellation or merger, nor does it imply that such investigation or research has been performed.

Elements of the Status Opinion. The consensus of the Committee is that the elements of a status opinion for a limited partnership are as follows:

1. Two or more persons have associated to carry on as co-owners a business for profit, one of whom is a general partner and one of whom is a limited partner.[55]

2. A certificate of limited partnership has been filed with the California Secretary of State (but not that the certificate is free from misstatement).[56]

3. The partners have entered into a partnership agreement (which need not be in writing).[57]

4. No certificate of cancellation has been filed with respect to the limited partnership.

5. The limited partnership has not merged into another entity.

Investigation. Counsel ordinarily confirms the elements of a status opinion by reviewing a copy of the certificate of limited partnership certified by the Secretary of State with all amendments,[58] reviewing a copy of the signed limited partnership agreement, if there is one [59] and obtaining a certificate of one or more general partners that the copies of the certificate of limited partnership and the limited partnership agreement are true and complete, with all amendments.[60] Counsel may also wish to review a certificate of status from the Secretary of State.

Assumptions. In rendering a status opinion, unless the parties agree otherwise, the opinion giver is entitled to rely on the following assumptions which are specific to limited partnerships. These assumptions are in addition to other assumptions, such as the validity of signatures, which also apply in other contexts.[61]

Other assumptions are not normally expressly stated in the written opinion letter. These assumptions are:

(a) The activity in which the limited partnership is engaged is a business.

(b) The activity is being carried on for profit.

(c) Each of the partners is a co-owner of the business.

(d) The general partners have the legal capacity or entity power and authority to carry on the business of the limited partnership in their individual capacities.

(e) The limited partners have the legal capacity or entity power and authority to be limited partners of the limited partnership.

Misstatements in the Certificate of Limited Partnership. The consensus among the Committee is that a misstatement in a certificate of limited partnership does not affect the status of a limited partnership, notwithstanding the requirement of Section 15621 (a) of the Revised Act that the certificate set forth specific matters. First, Section 15621 (c) of the Revised Act provides that a certified copy of the certificate of limited partnership is conclusive evidence of the formation of a limited partnership and primafacie evidence of its existence. Second, Section 15624(c) of the Revised Act imposes liability on the general partners, and in certain cases limited partners, for misstatements in the certificate of limited partnership, which appears to be the only legal consequence of the misstatement.

Counsel rendering a status opinion normally does not verify the content of the certificate of limited partnership, other than to confirm that the certificate relates to the limited partnership that is the subject of the opinion. If counsel knows of a misstatement in the certificate of limited partnership, counsel should state an exception to a status opinion only if counsel has concluded that the fact is material to the transaction. Failure of all of the general partners to sign the certificate of limited partnership could be a material misstatement if the result is confusion as to the identities of the general partners. As a matter of professional responsibility to the client, however, counsel normally calls the misstatement to the client's attention so the mistake can be corrected before an opinion is rendered.

Limited Partnerships Formed Before July 1, 1984. Between 1949 and July 1, 1984, limited partnerships were formed under the California Uniform Limited Partnership Act (the "Original Act") .[62] A limited partnership was formed under the Original Act when two or more persons executed and acknowledged a certificate containing the detailed information set forth in Section 15502(l)(a) of the Corporations Code (a "longform" certificate) and recorded the certificate in the office of the recorder of the county in which the principal place of business of the partnership was situated.[63] Unlike the Revised Act, there was no prescribed preprinted form of certificate of limited partnership.

Section 15712(b)(2) of the Revised Act requires limited partnerships formed before July 1, 1984 to file a certificate of limited partnership with the Secretary of State on form LP-1. Once the form LP-1 is filed, the limited partnership is governed by Article 2 of the Revised Act, which includes Section 15621 concerning the formation and existence of limited partnerships and matters relating to the certificate of limited partnership. The limited partnership continues to be governed by the Original Act with respect to all matters other than formation and the certificate of limited partnership (which is covered by Article 2 of the Revised Act) and merger (which is covered by Article 7.5 of the Revised Act). Section 15712(c) provides that the long-form certificate of limited partnership continues to be effective "[to the extent that the provisions of the certificate ... governed the rights and obligations of the partners and the limited partnership among each other."

If a limited partnership formed before July 1, 1984 has filed a form LP-1 with the Secretary of State, it is not necessary for counsel to review the Original Act to determine whether the partnership has been duly formed or exists or is in good standing. If a limited partnership formed before July 1, 1984 has not filed form LP- I with the Secretary of State, its existence would be determined in accordance with the Original Act. This Report will not discuss the question of existence under the Original Act, however, because as a matter of professional responibility to the client, counsel should advise the limited partnership to file the form LP-1.

50 See Corporations Report § VA.4.
51 CAL. CORP. CODE § 15623(b) (West 1998).

52 CAL. REV. AND TAX. CODE § 23081 (West 1998). Currently, the tax is $800 per annum.

53 The general partners are personally liable for the tax, however.

54 CAL. CORP. CODE § 15611 (c) (West 1998) defines "certificate of limited partnership" to include "all amendments thereto." The Secretary of State interprets § 15611 (c) to include any certificate of dissolution or cancellation among such amendments. Some practitioners specifically request copies of all amendments and any certificate of dissolution or cancellation. The Secretary of State will, upon request, issue a listing of all filings with respect to a particular limited partnership.

55 CAL. CORP. CODE § 15006 (repealed effective January 1, 1999), 15611 (r), and 16202 (West 1998). A status opinion concerning a limited partnership need not be qualified by reference to Sherman v. Lloyd, 181 Cal. App. 3d 693, 226 Cal. Rptr. 495 (1986), which construed the availability of the exemption from qualification under the California Corporate Securities Act under Corporations Code Section 25102(f) before that section was amended in November 198 1. Section 1562 1 (b) of the Revised Act makes it clear that Sherman v. Lloyd does not affect the law of partnerships.

56 CAL. CORP. CODE § 15621 (a) - 1562 1 M and 15712(b) (2) (West 1998). See the discussion regarding the effect of misstatements infta.

57 CAL. CORP. CODE § 15621 (a) (West 1998).

58 CAL. CORP. CODE § 15623(c) (West 1998) provides that such a copy is conclusive evidence of the formation of the limited partnership and prima facie evidence of its existence.

59 It is possible to enter into an oral limited partnership agreement. CAL CORP CODE § 15611 (y) (West 1998). The existence of an oral limited partnership agreement can be confirmed by a certificate executed by at least one general partner stating that the partners have entered into a limited partnership agreement to form the entity that is the subject of the opinion. Counsel should exercise caution when rendering an opinion with respect to an oral partnership. Without a written agreement, it may be difficult for counsel to establish the terms of the agreement among the partners.

60 Section 3 of the Accord, which the Committee believes is generally consistent with non-Accord practice, governs the use of client certificates to establish the facts on which an opinion is based. In this regard, Section 3(b) of the Accord states that an opinion giver may not rely on statements of a legal conclusion at issue in a client certificate. Counsel should be mindful of Commentary 13.1 of the Accord, which cautions against relying on "conclusory assertions" in client certificates without supporting information to justify the assertion.

61 For a discussion of the use of express and implicit assumptions in opinion letters, see Corporations Report pp. 17-19 and Accord § 4.

62 CAL. CORP. CODE §§ 15501-15533 (West 1998).

63 A limited partnership was formed if there was substantial compliance in good faith with the requirements of Section 15502(l). CAL. CORP. CODE § 15502(2) (West 1998).

3. Registered Limited Liability Partnerships.

California now recognizes the creation of "registered limited liability partnerships" or LLPs .[64] An LLP is a California general partnership, formed for the purpose of practicing law or accountancy, in which the members enjoy certain limitations on the liability to which they would otherwise be subject as general partners. Opinions as to whether a general partnership is a registered limited liability partnership are beyond the scope of this Report.

4. Registration of Foreign Limited Partnerships.

California counsel are occasionally asked to render an opinion that a foreign limited partnership is qualified to do business in California. It should be noted that, as is the case with foreign corporations, the Revised Act only requires a foreign limited partnership to register to conduct intrastate business.[65] A limited partnership that is required to register but has not done so may nonetheless conduct interstate business, enter into contracts, and defend lawsuits. [66] It must register before it may maintain an action, and failure to register subjects it to penalties of Up to $10,000.[67] There is a special rule for foreign lending institutions organized as foreign limited partnerships.[68]

Recommended Wording of the Due Qualification Opinion. The Committee recommends the following wording of the due qualification opinion:

> The limited partnership is duly registered to transact intrastate business as a foreign limited part nership and is in good standing in California.

Contrast with Corporate Due Qualification Opinion. The Committee's recommended formulation is similar to a common corporate formulation, but substitutes the phrase "registered to transact intrastate business" for "qualified to do business."[69] This is to reflect the language used in Section 15692 of the Revised Act, which pertains to registration of foreign limited partnerships.

Investigation. Opinions as to foreign registration can be based solely on a certificate of registration issued by the Secretary of State.

C. POWER TO CONDUCT BUSINESS.

Opinion recipients normally want to know that the business of the partnership is one that can lawfully be carried on by the partnership as a matter of partnership law. While opinion recipients also want to know whether other legal restrictions, such as industry regulations, affect the business, such concerns are normally addressed in a separate opinion, if at all, and not in the "power to conduct business" opinion.

Recommended Wording of Power-to-Conduct-Business Opinion. The Committee recommends the wording set forth below for the power-to-conduct-business opinion. The wording is similar for both general and limited partnerships.

The [name of entity] has the [limited] partnership power [and authority] to own its properties and assets and to carry on its business [as it is currently being conducted].

Contrast with Corporate Power-to-Conduct-Business Opinion. The Committee's recommended formulation is similar to a common corporate formulation, but substitutes the word or phrase "[limited] partnership" for corporate. "[70]

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64 CAL. CORP. CODE §§ 15047-15058 (repealed effective January 1, 1999) and 16951 - 16962 (West 1998).

65 See CAL. CORP. CODE § 2105 (West 1998) with respect to foreign corporations. With respect to foreign limited partnerships, see CAL. CORP. CODE § 15692 (West 1998). "'Transact intrastate business' means entering into repeated and successive transactions of business in this state, other than interstate or foreign commerce." CAL. CORP. CODE § 15611 (ag) (West 1998). Counsel does not normally opine as to whether a foreign limited partnership is not conducting intrastate business and is therefore exempt from registration unless the counsel has extensive prior knowledge of the Aimited partnership's activities. See Guideline 1.13.4.

66 CAL. CORP. CODE § 15697 (West 1998).

67 Id.

68 CAL. CORP. CODE § 15699 (West 1998).

69 Corporations Report, § V.13.3.

70 Corporations Report, § V.13.1.

1. General Partnerships.

"*Power [and Authority]*. " There are two major distinctions between the power [and authority] of a corporation and a general partnership. First, the General Corporation Law affirmatively states that a corporation "may engage in any business activity "with certain specific exceptions". There is no counterpart authorization in CUPA or RUPA. The phrase "partnership power and authority" therefore does not imply that a general partnership's power is created by a statute in the same way that a corporation's power is created." A general partnership's power derives from its partners .[71]

Second, it is uncommon for the articles of incorporation of a corporation to restrict the power or business purpose of a corporation, but it is common for the partnership agreement of the general partnership to restrict the business purpose and powers of the general partnership.

With respect to a corporation, the use of the word corporate" before "power" serves to limit the opinion to the effect of the California General Corporation Law and the corporation's articles of incorporation and to preclude any interpretation that the corporation has any approvals or authorizations under other statutes, such as those that regulate particular industries or activities. With respect to a partnership, the use of the word "partnership" or the phrase "limited partnership" serves the same function, which is to affirm that the partnership has the power under CUPA, RUPA, the Revised Act, or the Original Act, as the case may be, to carry on its business and that its business is not restricted by the partnership agreement.

Addition of the phrase "and authority" does not affect the meaning of the opinion.

Exclusion of "Current Conduct" Language. The Committee acknowledges that past practice has been to include the phrase "as it is currently being conducted" in the power-to-conduct-business opinion. Based on evolving standards of opinion practice, however, the Committee is now generally of the view that it is inappropriate for an opinion recipient to request such language. While counsel may rely on a certificate of the client for a description of the partnership's business, it is the unusual situation where a certificate is comprehensive enough to describe all the ways in which the business of the partnership is being conducted. Requesting such language from counsel places an investigatory burden on counsel that is out of proportion to any value to be gained from the opinion. Moreover, because the opinion is so fact-sensitive, an opinion recipient should not rely on such an opinion to any material extent.

*Elements of the Power-t*o-Conduct-Business Opinion. The consensus of the Committee is that the elements of the power-to-conduct-business opinion for a general partnership are as follows:

1. The partnership's business is within the scope of the purpose of the partnership.[72]

2. The partners have the legal capacity or entity power and authority to conduct the business of the partnership in their individual capacities (although as noted below, this is normally assumed.[73]

Investigation. Counsel may determine that a general partnership has the partnership power and authority to conduct its business by reviewing a certified[74] copy of the partnership agreement as amended, particularly the sections that deal with (a) the purpose of the partnership, (b) specific authorizations of one or more of the general partners, and (c) limitations on the authority of the general partners. It is not unusual for counsel to require the partners to specifically ratify past or proposed activities or to amend the partnership agreement before counsel will render a power-to-conduct-business opinion.

If the partnership is governed by RUPA, counsel also reviews any statements of authority, denial, dissociation, and dissolution filed with the California Secretary of State pursuant to RUPA .[75] A statement of authority may

71 CAL. CORP. CODE § 206 (West 1998).

72 As previously discussed, a general partnership is merely an association of two or more persons to carry on a business for profit as co-owners. The powers of a general partnership are nothing more than the sum of the powers of its partners. Thus, both CUPA and RUPA recognize a general partnership's power rather than create it.

73 By definition, each partner is carrying on the partnership's business as a co-owner (see CAL. CORP. CODE §§ 15009 (repealed effective January 1, 1999) and 16202 (West 1998)) and must therefore have the power and authority to carry on that business. For example, two corporations that are not each authorized to carry on the banking business could not form a general partnership to carry on the banking business.

74 In this case, certified by one or more of the general partners as being true and complete, rather than certified by the Secretary of State.

75 CAL. CORP. CODE §§ 16303, 16304, 16704, and 16805 (West 1998).

specify the authority, or limitations on the authority, of some or all of the partners to enter into other transactions on behalf of the partnership and any other matter. [76] The information contained in statements of denial, dissociation, or dissolution can all operate as limitations on a partner's authority.[77]

Generally, a grant of authority contained in a statement of authority which is not contradicted by a limitation on that authority contained in another filed statement is conclusive in favor of a person who gives value without knowledge that the person does not have the necessary authority.[78] With respect to transfers of real estate, however, no presumption is created unless a certified copy of the statement of authority has been recorded in the office for recording transfers of the real property. In addition, a limitation on that authority contained in another filed statement is not effective to contradict the statement of authority unless a certified copy of the filed statement has also been recorded in the office for recording transfers of the real property. [79]

In contrast to a grant of authority, a limitation on a partner's authority contained in a filed statement is generally not binding on third parties,[80] except with respect to transfers of real property if a certified copy of the filed statement containing the limitation has been recorded in the office for recording transfers of the real property.[81]

Third parties (including parties to a transfer of real estate) are deemed to have notice of the dissociation of a partner or the dissolution of the partnership 90 days after filing the statement of dissociation[82] or dissolution,[83] as the case may be, regardless of whether a certified copy of the filed statement has been recorded in the office for recording transfers of the real property.

Assumptions. In rendering a power-to-conduct-business opinion, unless the parties agree otherwise, the opinion giver is entitled to rely on the assumptions set forth below. These assumptions are in addition to other assumptions, such as the validity of signatures, which also apply in other contexts.[84] These assumptions are not normally expressly stated in the written opinion letter. These assumptions are:

> (a) Partners who are natural persons have the legal capacity to conduct the partnership business in their individual capacities.[85]
>
> (b) Partners who are entities (other than limited liability companies) have the entity power and authority to conduct the general partnership's business in their individual capacities unless a statute pertaining to the permitted business activities for such an entity otherwise provides.[86]
>
> (c) Partners that are limited liability companies (whether foreign or domestic) are not engaged, on behalf of the partnership, in the business of rendering professional services, as defined in subdivision (a) of Section 13401 of the Corporations Code, in California except in accordance with express provisions of the Business and Professions Code or the Chiropractic Act.[87]

Any opinion as to the [entity] power and authority of a partner to conduct the business of a general partnership should be separately requested. Any such opinion is normally rendered, if at all, by the counsel that normally represents that general partner.

76 CAL. CORP CODE § 16303(a)(2) (West 1998).
77 CAL. CORP. CODE § 16304, 16704(b), and 16805(b) (West 1998).
78 CAL. CORP. CODE §§ 16303(d)(1) (West 1998).
79 CAL. CORP. CODE §§ 16303(d)(2) and 16303(f) (West 1998).
80 CAL. CORP. CODE § 16303(f) (West 1998).
81 CAL. CORP. CODE § 16303(e) (West 1998).
82 CAL. CORP. CODE § 16704(c) (West 1998).
83 CAL. CORP CODE § 16805(c) (West 1998).
84 For a discussion of the use of express and implicit assumptions in opinion letters, see Corporations Report pp. 17-19 and Accord 4.
85 See Accord § 4 (a).
86 CAL. CORP CODE § 206 (West 1998) for corporations; CAL. CORP. CODE § 15616 (West 1998) for limited partnerships.
87 CAL. CORP. CODE § 17002 (West 1998). An uncodified statute, 1994 Cal. Star. 1200 § 93, further restricts the ability of limited liability companies to engage in certain businesses. Section 93 reads as follows: "Nothing in this act shall be construed to permit a domestic or foreign limited liability company to render professional services, as defined in subdivision (a) of Section 13401 of the Corporations Code, in this state unless express authorized under applicable provisions of the Business and Professions Code or the Chiropractic Act." A list of the "professions" that the Business and Professions Code does not authorize to be conducted by an LLC is beyond the scope of this Report. The range of businesses that are subject to regulation under the Business and Professions Code is, however, more extensive that what are commonly thought of as professional occupations.

Exception for Partnerships in Dissolution. If a partnership has dissolved, its power is limited to actions that are appropriate to the winding-up process." Absent an exception in the written opinion letter, a power-to-conduct-business opinion with respect to a dissolved partnership means that the actions of the partnership are consistent with the winding-up process. Such a conclusion normally depends on knowledge of the facts that is beyond the capacity of counsel to ascertain. To establish the necessary facts, a certificate of the client would have to describe all of the actions of the partnership without resorting to a conclusory statement that all of the actions are part of the winding up process. Accordingly, when a partnership has dissolved, counsel normally excludes any opinion concerning the winding-up process. Such an exclusion may be worded as follows:

> We note that the Partnership has dissolved. We render no opinion as to whether the present conduct of the Partnership's business is consistent with the limitation on the authority of the partners to those actions that are [necessary to wind up the Partnership's affairs and complete transactions begun but not yet finished / for the purpose of winding up the business of the Partnership] .[89]

2. Limited Partnerships.

"*Power [and Authority]*. " Limited partnerships enjoy an express statutory grant of power in the same way that corporations do. Limited partnerships formed on or after July 1, 1984, and limited partnerships formed before that date that have elected to be governed by the Revised Act, derive their power to conduct business from Section 15616 of the Revised Act, which states that a limited partnership may carry on any business that a general partnership may carry on, other than the banking, insurance, or trust company business. Limited partnerships formed between 1949 and July 1, 1984 that have not elected to be governed by the Revised Act" derive their power from Section 15503 of the Original Act, which states that a limited partnership may carry on any business that a general partnership may carry on, except banking and insurance.[90]

Although limited partnerships can be formed to pursue virtually any business, it is common for the partnership agreement of a limited partnership to restrict the business purpose and powers of the limited partnership.

The use of the phrase "limited partnership" serves to affirm that the limited partnership has the power under the Revised Act or the Original Act, as the case may be, to carry on its business, and that its business is not restricted by the partnership agreement. It also serves to negate any implication that the limited partnership has any approvals or authorizations under other statutes, such as those that regulate particular industries or activities.

Addition of the phrase "and authority" does not affect the meaning of the opinion.

Elements of the Power-to-Conduct-Business Opinion. The consensus of the Committee is that the elements of the power-to-conduct-business opinion for a limited partnership are as follows:

1. The limited partnership's business is permitted under the Original Act or the Revised Act, as applicable.

2. The limited partnership's business is within the scope of the purpose of the limited partnership.

3. The general partners have the legal capacity or entity power and authority to conduct the business of the limited partnership in their individual capacities (although as noted below, this is normally assumed).

Investigation. Counsel may determine that a limited partnership has the limited partnership power and authority to conduct its business by reviewing a certified[91] copy of the partnership agreement as amended,

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88 CAL. CORP. CODE §§ 15033 (repealed effective January 1, 1999) and 16802(a) (West 1998).

89 The first formulation reflects the statutory language of CAL. CORP. CODE § 15033 (West 1998) (repealed effective January 1, 1999) and is appropriate for general partnerships governed by CUPA. The second formulation reflects the statutory language of CAL. CORP CODE § 16802(a) (West 1998) and is appropriate for general partnerships governed by RUPA.

90 An election to be governed by the Revised Act requires the written consent of all partners or of the lesser number provided in the limited partnership agreement for this election. CAL. CORP. CODE § 15712(b) (1) (West 1998). Counsel may review a certified copy of the consent and the provisions of the limited partnership agreement relating to actions by the limited partners to determine that the election has been made. Similarly, counsel may review a certificate of one or more of the general partners to determine that the election has not been made.

91 In this case, certified by one or more of the general partners as being true and complete, rather than certified by the Secretary of State.

particularly the sections that deal with (a) the purpose of the partnership, (b) specific authorizations of one or more of the general partners, (c) limitations on the authority of the general partners, and (d) voting or approval rights of the limited partners.

If the limited partnership is governed by the Original Act, counsel also reviews the "long-form" certificate of limited partnership originally recorded pursuant to the Original Act. Section 15712(c) provides that the longform certificate of limited partnership continues to be effective "[to the extent that the provisions of the certificate ... governed the rights and obligations of the partners and the limited partnership among each other" even if (subject to certain exceptions) the partnership has elected to be governed by the Revised Act.

Counsel also reviews the certificate of limited partnership filed with the California Secretary of State for any limitations on authority or other relevant information which may have been included in the certificate pursuant to Section 15 5 21 (a) (5) of the Revised Act or any certificate of dissolution that may have been filed pursuant to Section 15623(a) of the Revised Act. Except with respect to real estate transactions,[92] no provision of the Revised Act gives legal effect to any limitation on authority included with a certificate of limited partnership. If such a limitation exists, however, it may suggest other issues counsel to the partnership or the opinion recipient may wish to explore.

Since a limited partnership enjoys an express grant of statutory power, it might not be necessary for the general partner to have the legal capacity or entity power and authority to carry on the limited partnership's business. There are no reported cases construing Sections 15611 (r) (definition of "limited partnership") or 15616 of the Revised Act. An opinion recipient who desires an opinion concerning the general partner's power to carry on the limited partnership's business should expressly request such an opinion and not assume that such an opinion is included in the opinion concerning the limited partnership's power to conduct business.

Since limited partners are not authorized to carry on the business of the limited partnership, the power-toconduct-business opinion does not imply that the limited partners have the legal capacity or entity power and authority to do so. Similarly, the power-to-conduct business opinion does not imply that there is no restriction in a limited partner's charter documents or any applicable law or regulation prohibiting the limited partner from being a limited partner in the partnership. In the experience of the members of the Committee, opinions regarding the limited partners are rarely requested or given.

Assumptions. In rendering a power-to-conduct-business opinion, unless the parties agree otherwise, the opinion giver is entitled to rely on the assumptions set forth below. These assumptions are in addition to other assumptions, such as the validity of signatures, which also apply in other contexts.[93] These assumptions are not normally expressly stated in the written opinion letter. The assumptions are:

(a) The limited partnership is not engaged in the banking, insurance, or trust company busness.[94]

(b) General partners who are natural persons have the legal capacity to conduct the partnership business in their individual capacities.[95]

(c) General partners that are entities (other than limited liability companies) have the entity power and authority to conduct the limited partnership's business in their individual capacities unless a statute pertaining to the permitted business activities for such an entity otherwise provides. [96]

(d) General partners that are limited liability companies (whether foreign or domestic) are not engaged, on behalf of the limited partnership, in the business of rendering professional services, as

92 CAL. CORP. CODE § 15621(d) (West 1998).

93 For a discussion of the use of express and implicit assumptions in opinion letters, see Corporations Report pp. 17-19 and Accord § 4.

94 See CAL. CORP. CODE §§ 15503 and 51616 (West 1998).

95 See Accord § 4 (a).

96 CAL. CORP. CODE § 206 (West 1998) for corporations; CAL. CORR CODE § 15616 (West 1998) for limited partnerships.

defined in subdivision (a) of Section 13401 of the Corporations Code, in California except in accordance with express provisions of the Business and Professions Code or the Chiropractic Act. [97]

Any opinion as to the [entity] power and authority of a general partner to conduct the business of a general partnership should be separately requested. Any such opinion is normally rendered, if at all, by the counsel that normally represents that general partner.

Exception for Limited Partnerships in Dissolution. If a limited partnership has dissolved, its power is limited to actions that are appropriate to the winding-up process[98] Absent an exception in the written opinion letter, a power-to-conduct-business opinion with respect to a dissolved limited partnership means that the actions of the limited partnership are consistent with the winding-up process. Such a conclusion normally depends on knowledge of the facts that is beyond the capacity of counsel to ascertain. To establish the necessary facts, a certificate of the client would have to describe all of the actions of the limited partnership without resorting to a conclusory statement that all of the actions are part of the winding up process. Accordingly, when a limited partnership has dissolved, counsel normally excludes any opinion concerning the winding-up process. Such an exclusion may be worded as follows:

> We note that the Limited Partnership has dissolved. We render no opinion as to whether the present conduct of the Limited Partnership's business is consistent with the limitation on the authority of the general partners to those actions that are [necessary to wind up the Partnership's affairs and complete transactions begun but not yet finished / appropriate for winding up partnership affairs or completing transactions unfinished at dissolution].[99]

D. POWER AND AUTHORITY TO ENTER INTO THE AGREEMENT.

A variation on the power-to-conduct-business opinion is the power-to-enter-into-the-agreement opinion. Opinion recipients normally want to know that the partnership can lawfully enter into the transaction that is the subject of the opinion as a matter of partnership law. The commentary and analysis set forth above with respect to the power-to-conduct-business opinion applies equally to the power-to-enter- into- the-agreemen t opinion.

Recommended Wording of Power-to-Enter-Into-theAgreement Opinion. The Committee recommends the following wording of the power-to-enter-into-the-agreement opinion:

> The [name of entity] has the [limited] partnership power [and authority] to enter into and per form the agreement.

Opinions with respect to the power to carry on business and the power to enter into an agreement may be combined as follows:

> The [name of entity] has the [limited] partnership power and authority to enter into and perform the agreement, to own its properties and assets, and to carry on its business [as it is currently being conducted].

Contrast with Corporate Power-to-Enter-Into-theAgreement Opinion. The Committee's recommended formulation is similar to a common corporate formulation but substitutes the word or phrase "[limited] partnership" for "corporate." [100]

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97 CAL. CORP. CODE § 17002 (West 1998). An uncodified statute, 1994 Cal. Stat. 1200 § 93, further restricts the ability of limited liability companies to engage in certain businesses. Section 93 reads as follows: "Nothing in this act shall be construed to permit a domestic or foreign limited liability company to render professional services, as defined in subdivision (a) of Section 13401 of the Corporations Code, in this state unless expressly authorized under applicable provisions of the Business and Professions Code or the Chiropractic Act." A list of the "professions" that the Business and Professions Code does not authorize to be conducted by an LLC is beyond the scope of this Report. The range of businesses that are subject to regulation under the Business and Professions Code is, however, more extensive that what are commonly thought of as professional occupations.

98 CAL. CORP. CODE §§ 15006(2) (repealed effective January 1, 1999), 15033 (repealed effective January 1, 1999), 15509(1), 15685, and 16802(a) (West 1998). See also CAL. CORP. CODE § 16803(c) (West 1998), which may apply to limited partnerships governed by the Original Act by virtue of CAL. CORP. CODE § 15509(l) (West 1998).

99 The first formulation reflects the statutory language of CAL. CORP. CODE § 15033 (West 1998) (repealed effective January 1, 1999) and is appropriate for limited partnerships governed by the Original Act, notwithstanding the adoption of RUPA. The second formulation reflects the statutory language of CAL. CORP. CODE §§ 15685 and 16804(1) (West 1998) and is appropriate for limited partnerships governed by the Revised Act.

100 Corporations Report, § V.B.2.

With respect to a corporation, the power-to-enter-into-the-agreement opinion means that the acts contemplated by the agreement would not be ultra vires.[101] While the phrase ultra vires is not commonly associated with partnerships, the concern that a partnership's charter documents may restrict the partnership's ability to enter into a particular agreement is nonetheless valid.

Elements of the Power-to-Enter-Into-the-Agreement Opinion. The consensus of the Committee is that the elements of the power-to-enter-into-the-agreement opinion for a partnership are as follows:

1.With respect to a limited partnership, the transaction relates to a business that is permitted under the Original Act or the Revised Act, as applicable.

2.The transaction relates to a business that is within the scope of the purpose of the partnership.

3.If the partnership has dissolved, the transaction is [for general partnerships governed by CUPA and limited partnerships governed by the Original Act: necessary to wind up partnership affairs or to complete transactions begun but not then finished[102]] [for general partnerships governed by RUPA: for the purpose of winding up its business[103]] [for limited partnerships governed by the Revised Act: appropriate for winding up partnership affairs or completing transactions unfinished at dissolution [104]] .

Investigation. Counsel may determine that a general or limited partnership has the [limited] partnership power and authority to enter into the agreement by reviewing a certified[105] copy of the partnership agreement as amended, particularly the sections that deal with (a) the purpose of the [limited] partnership, (b) specific authorizations of one or more of the general partners, and (c) limitations on the authority of the general partners.

In the case of a general partnership governed by RUPA, counsel also reviews any statements of authority, denial, dissociation, or dissolution filed with the California Secretary of State. See the discussion of the effect of such statements set forth under Section III.B. 1. - Investigation, *ante*.

In the case of a limited partnership, counsel also reviews the certificate of limited partnership filed with the California Secretary of State for any limitations on authority or other relevant information which may have been included in the statement pursuant to Section 15621 (a) (5) of the Revised Act or any certificate of dissolution that may have been filed pursuant to Section 15623(a) of the Revised Act. Except with respect to real estate transactions, [106] no provision of the Revised Act gives legal effect to any limitation on authority included with a certificate of limited partnership. [107] If such a limitation exists, however, it may suggest other issues counsel to the partnership or the opinion recipient may wish to explore.

If the limited partnership is governed by the Original Act, counsel also reviews the "long-form" certificate of limited partnership originally recorded pursuant to the Original Act. Section 15712(c) provides that the longform certificate of limited partnership continues to be effective "[to the extent that the provisions of the certificate ... governed the rights and obligations of the partners and the limited partnership among each other" even if (subject to certain exceptions) the partnership has elected to be governed by the Revised Act.

In many situations the proposed transaction does not fit squarely within the express purpose of the partnership or is not expressly included in the various authorizations that are typically included in partnership agreements. Depending on the degree of uncertainty involved, counsel may in some cases be justified in relying on a certificate of one or more of the general partners which

101 *Id*.

102 CAL. CORP. CODE § 15006(2) (repealed effective January 1, 1999), 15033 (repealed effective January 1, 1999), and 155090) (West 1998).

103 CAL. CORP. CODE § 16802(a) (West 1998).

104 CAL. CORP. CODE § 15685 (West 1998).

105 In this case, certified by one or more of the general partners as being true and complete, rather than certified by the Secretary of State.

106 CAL. CORP. CODE § 15621 (d) (West 1998).

107 It is not clear whether a restriction on the authority of a general partner included on a certificate of limited partnership recorded pursuant to Section 15621 of the Revised Act is effective to put third parties on constructive notice of the restriction. Section 15621 of the Revised Act states that recordation creates the same presumptions as provided in Section 15101.5 of CUPA (repealed effec tive January 1, 1999). It is Section 15101.7 of CUPA (repealed effective January 1, 1999), however, that provides for constructive notice of the contents of a restriction on the authority of individual partners to convey interests in real estate.

states the intentions and understanding of the parties in forming the partnership and defining its scope. It is not unusual for counsel to require the partners to amend the partnership agreement, or to execute a certificate or waiver that has the effect of amending the partnership agreement, before counsel will render a power-to-enterinto-the-agreement opinion.

Where the partnership has dissolved, counsel must also determine whether the proposed transaction is consistent with the limitations on the powers of the [general] partners to the winding up of partnership affairs and completion of unfinished business. In most cases ' the determination will be relatively easy. For example, the sale of partnership property is consistent with winding up partnership affairs while a refinancing of partnership debt that is not otherwise due and payable would not normally be consistent with winding up partnership affairs.[108]Section 16803 (c) of RUPA expressly states that a person winding up a partnership's business may "preserve the partnership business or property as a going concern for a reasonable time, prosecute and defend actions and proceedings, whether civil, criminal, or administrative, settle and close the partnership's business, dispose of and transfer the partnership's property, discharge the partnership's liabilities, distribute the assets of the partnership pursuant to Section 16807, settle disputes by mediation or arbitration, and perform other necessary acts." While this authorization only applies to general partnerships governed by RUPA, a court would likely find the list to be declarative of those actions that are appropriate for the winding up of any partnership.

Assumptions. In rendering a power-to-enter-into-theagreement opinion, unless the parties agree otherwise, the opinion giver is entitled to rely on the assumption set forth below. This assumption is in addition to other assumptions, such as the validity of signatures, which also apply in other contexts.[109] This assumption is not normally expressly stated in the written opinion letter. The assumption is:

> In cases where the partnership has dissolved, the sale of any given partnership asset is "necessary" or 11 appropriate" to wind up partnership affairs within the meaning of Section 15033 of CUPA, Section 15685 of the Revised Act, and Section 16804 of RUPA, respectively, as applicable.

E. DUE AUTHORIZATION, EXECUTION, AND DELIVERY.

Assuming that a [limited] partnership has the [limited] partnership authority to enter into a proposed transaction, the opinion recipient will still want to know that the transaction has been authorized by any necessary vote of the partners and that the transaction documents have been duly executed and delivered by the appropriate partners on behalf of the [limited] partnership.

Recommended Wording of the Due Authorization, Execution, and Delivery Opinion. The Committee recommends the following wording of the due authorization, execution, and delivery opinion:

> The agreement has been duly authorized by all necessary [limited] partnership action on the part of the partners and has been duly executed and delivered by the [name of entity].

Contrast with Corporate Due Authorization, Execution, and Delivery Opinion. The Committee's recommended formulation is similar to a common corporate formulation but substitutes the word or phrase "[limited] partnership" for "corporate." [110]

1. Due Authorization of the Agreement.

(a) Meaning.

"Due authorization" refers to actions taken by the general partners and, if necessary, by any limited partners. The corporate version of the power-to-enter-into-the-agreement opinion uses the phrase "corporate action" to avoid any implication that the opinion refers to any regulatory authority[111] The phrase "[limited] partnership action" serves the same purpose. The corporate version of the opinion uses the phrase "on the part of the corporation" in lieu of expressly stating whether or not the particular action is one that requires shareholder consent. The phrase "on

108 For a discussion of what constitutes unfinished business, see Grossman v. Davis, 28 Cal. App. 4th 1833, 34 Cal. Rptr. 2d 355 (1994).

109 For a discussion of the use of express and implicit assumptions in opinion letters, see Corporations Report pp. 17-19 and Accord § 4.

110 Corporations Report, § V.13.3.

111 Corporations Report, § V.13.3.

the part of the partners" refers to the general partners and, if appropriate, any limited partners. The Committee prefers the phrase "on the part of the partners" to the phrase "on the part of the Partnership."

The "duly authorized" opinion does not encompass an opinion that the general partner(s) approving the transaction or acting on behalf of the [limited] partnership are in compliance with their fiduciary duties. Fiduciary questions are largely factual and subjective in nature and are not normally the subject of legal opinions.

(b) Elements of the Due-Authorization-of-the-Agreement Opinion.

Elements of the Due-Authorization-of-the-Agreement Opinion. The consensus of the Committee is that the elements of the due-authorization-of-the-agreement opinion for a partnership are as follows:

1 . The [limited] partnership agreement does not restrict the power of the partners who are executing the transaction documents unless the restriction has been complied with or waived.

2. The partners have complied with any procedural requirements of the [limited] partnership agreement unless the requirements have been waived.

3. There is no restriction in CUPA, RUPA, the Original Act, or the Revised Act, as applicable, on the power of the partners who are executing the transaction documents unless the restriction has been complied with or waived.

(c) Investigation.

To opine that a transaction is duly authorized, counsel first determines whether the [limited] partnership agreement authorizes or restricts the transaction. Second, counsel determines whether the [limited] partnership agreement requires any specific partner action, such as a vote, to authorize the transaction, and if so, whether that action has been taken. Third, counsel determines whether any applicable provision of CUPA, RUPA, the Original Act, or the Revised Act, as appropriate, restricts the ability of the [limited] partnership to enter into the transaction or requires a vote other than that set forth in the [limited] partnership agreement.

Transactions Outside the Ordinary Course of Business or Not Carried On "In the Usual Way. " As a general rule, the consent of all of the partners of a general partnership is required for any transaction that is "outside the ordinary course of a partnership" governed by RUPA[112] or is "not apparently for carrying on the business of the partnership [governed by CUPA in the usual way."[113] These provisions may apply to the general partners of limited partnerships as well as partners of general partnerships by virtue of Section 15006(2) of CUPA,[114] Section 15509) of the Original Act,[115] and Sections 15643(a) and 15722 of the Revised Act.[116] The RUPA standard, as articulated in Section 16401(j), appears to look to what is outside the ordinary for any partnership,[117] while the CUPA standard appears to look to what is not in the "usual way" for the particular partnership involved. Section 16301(l) of RUPA, however, refers to the partnership business or business of the kind carried on by the partnership" for the purpose of determining whether a partnership agent has apparent authority.

California courts have held that an action is not " in the usual way" if it involves the disposition of an important partnership asset[118]or involves giving security for the

112 CAL. CORP. CODE § 16401(j) (West 1998).

113 CAL. CORP. CODE § 15009(b) (West 1998) (repealed effective January 1, 1999).

114 CAL. CORP. CODE § 15006(2) (West 1998) (repealed effective January 1, 1999) provides, "[CUPA] shall apply to limited partnership insofar as the statutes relating to such partnerships are inconsistent [with CUPA]

115 CAL. CORP. CODE § 15509(1) (West 1998) provides "A general partner shall have all the rights and powers and be subject to all the restrictions and liabilities of a partner in a partnership without limited partners."

116 CAL. CORP. CODE § 15643(a) (West 1998) provides "Except as otherwise provided in this chapter, a general partner of a limited partnership has the rights and powers and is subject to the restrictions of a partner in a partnership without limited partners." CAL. CORP. CODE § 15722 (West 1998) provides, "In any case not provided for in this chapter, limited partnerships shall be governed in the same manner as general partnerships would be governed pursuant to Section 16111, by the Uniform Partnership Act [CUPAI (Chapter I (commencing with Section 1500 1)), or the Uniform Partnership Act of 1994 [RUPA] (Chapter 5 (commencing with Section 16100))."

117 Cf. CAL. CORP. CODE § 16301 (West 1998).

118 William v. Tam, 131 Cal. 64, 63 P. 133 (1900) (individual partner in race horse partnership does not have unilateral power to sell partnership property); Henderson v. Nicholas, 67 Cal. 152, 7 P. 412 (1885) (individual partner in water rights partnership does not have power to convey other partner's interest).

personal debt of a partner." Additional actions that are not normally "in the usual way" or outside the ordinary course of a partnership include a sale of substantially all of the assets of the partnership, a sale of real estate by a partnership that is not a dealer in real estate, borrowing other than trade debt, major acquisitions of real or personal property, encumbering partnership property other than with purchase money financing, admission of additional members, and issuance of partnership securities.

These cases cited above make it clear that the consent of all of the partners (or all of the general partners in the case of a limited partnership), and not just a majority or majority in interest, is required. RUPA makes the unanimity requirement explicit. Such an approval can of course be given in the partnership agreement.

Specific Actions Requiring Unanimous General Partner Consent or Limited Partner Consent. In addition to the foregoing requirements, CUPA, RUPA, the Original Act, and the Revised Act all identify certain actions that require the unanimous consent of the general partners or a vote of the limited partners of a limited partnership.

Actions that Require Unanimous Approval Under RUPA. Actions that require the unanimous consent of the partners of a general partnership or the general partners of a limited partnership pursuant to RUPA are as follows:

(a) the admission of an additional partner;[120] and

(b) amendment of the partnership agreement.[121]

Both of such provisions may be modified by the partnership agreement itself.[122]

Actions that Require Unanimous Approval Under CUPA. Actions that require the unanimous consent of the partners of a general partnership or the general partners of a limited partnership pursuant to CUPA are as follows: [123]

(a) assignment of partnership property in trust for creditors or on the assignee's promise to pay the debts of the partnership;
(b) disposition of the goodwill of the business (which would normally be included in any sale of substantially all of the assets of the partnership);
(c) any other act that would make it impossible to carry on the ordinary business of the partnership;
(d) confession of a judgment; and
(e) submission of a partnership claim or liability to arbitration or reference (beware of arbitration provisions in documents that would not otherwise be covered above).

Section 15009(3) of CUPA does not expressly state the time when the partners must authorize the foregoing transactions. Any advance authorization should be specific enough that a reasonable third person would conclude that the partners intended to authorize the foregoing transactions. Several reported cases indicate that consent may be given after the fact. [124]

Actions that Require Limited Partner Approval Under the Revised Act. Actions by a limited partnership governed by the Revised Act that also require the affirmative vote of a majority in interest of the limited partners include the following, unless the limited partnership agreement provides otherwise:[125]

119 Tsakos Shipping 6- Trading, S.A. v. Juniper Garden Town Homes, Ltd., 12 Cal. App. 4th74, 15 Cal. Rptr- 2d 585 (1993) and numer ous cases cited therein.

120 CAL. CORP. CODE § 16401(i) (West 1998).

121 CAL. CORP. CODE § 16401(j) (West 1998).

122 CAL. CORP. CODE § 16103 (West 1998).

123 CAL. CORP. CODE § 15009(3) (West 1998) (repealed effective January 1, 1999).

124 See, eg., Tsakos Shipping 6- Trading, S.A. v. Juniper Garden Town Homes, Ltd., 12 Cal. App. 4th 74, 93, 15 Cal. Rptr. 2d 585, 595 (1993). The Tsakos court stated, "[T]he general rule is that a partner has no authority to execute contracts of guaranty on behalf of the partnership without authority specially given him for the purpose, or implied from the common course of the business of the firm, or from the previous course of dealing between the parties, unLess the act of such partner is afterward ratified by his copart ners. " Id. (Emphasis added.) (Citing Rodahaugh v. Kauffman, 53 Cal. App. 676, 680, 200 P. 747 (1921).)

125 The Revised Act sets forth several enumerated rights. CAL. CORP. CODE § 15636(f) (West 1998). Unless the Revised Act contains a contrary provision, the partners are allowed to vary the provisions of CAL. CORP. CODE § 15618 in a partnership agreement. CAL. CORP. CODE § 15618 (West 1998). Counsel should be aware, however, that some of the enumerated rights may also be set forth in other sections of the Revised Act and that Section 15618 might not permit variation of those sections. For example, the right of limited partners to vote on a merger of the partnership is set forth both at Section 15636(f)(1)(B) and at Section 15678.2(a). Pursuant to Section 15618, variation of Section 15678.2 is not permitted.

(a) the dissolution and winding up of the limited partnership;

(b) the merger of the limited partnership[126] or sale, exchange, lease, mortgage, pledge, or other transfer of, or granting of a security interest in, all or a substantial part of the assets of the limited partnership other than in the ordinary course of its business;

(c) the incurrence (sic) of indebtedness by the limited partnership other than in the ordinary course of its business;

(d) a change in the nature of the partnership's business;

(e) transactions in which the general partners have an actual or potential conflict of interest with the limited partners or the partnership;

(f) an election to continue the business of the limited partnership in certain circumstances;

(g) the admission of a general partner and, in cases where there was otherwise no remaining or surviving general partner, the continuation of the business of the limited partnership (the ability to modify this right in the partnership agreement is limited);

(h) the right to vote on the removal of a general partner; and

(i) with respect to a limited partnership that is registered as an investment company under the Investment Company Act of 1940, as amended, or the rules and regulations of the Securities and Exchange Commission under that act, any matter to be approved by the holders of beneficial interests in an investment company.

The Revised Act provides that "majority-in-interest" means more than 50% of the interests of limited partners[127] and that "Interests of limited partners" is determined by reference to the "current profits" of the limited partnership.[128]The Revised Act does not define current profits," however. In some cases, particularly where there are multiple classes of limited partners, the definition of "majority-in-interest" may have the effect of discounting or weighting the votes of the limited partners in unexpected ways.

Section 15636(f) of the Revised Act implies that the approval of the limited partners must be determined in advance. The statute states that the general partners may take the actions "only with the affirmative vote" of the limited partners. [129]

With the exceptions noted above, the limited partnership agreement may specify that the limited partners do not have the right to vote on any or all of these matters. The right to vote exists unless the limited partnership agreement specifically negates it, however. 130" Thus, an enumeration in the partnership agreement of the limited partners' right to approve specific matters, without a statement to the effect that they have no other voting or approval rights, is not necessarily exclusive of the rights granted in Section 15636(f) of the Revised Act.

Actions that Require Unanimous Limited Partner Approval Under the Original Act. A general partner of a limited partnership governed by the Original Act is not authorized to take any of the following actions unless all of the limited partners have consented to or ratified the specific act:[131]

(a) any act in contravention of the long-form certificare of limited partnership required to be recorded in the county records; [132]

126 The right of the limited partners to vote on a merger of the partnership is set forth both at Section I 5636(f)(1)(B) of the Revised Act and at Section 15678.2(a) of the Revised Act. Section 15618 of the Revised Act does not permit the partnership agreement to vary Section 15678.2 of the Revised Act.

127 CAL. CORP. CODE § 15611 (u) (West 1998).

128 CAL. CORP. CODE § 15611 (p) (West 1998).

129 Cf. Section 15509(l) of the Original Act, which uses the word "ratification."

130 CAL. CORP. CODE § 15618 (West 1998).

131 The enumerated rights are set forth at Section 15509(1) of the Original Act, which provides that the general partners have no authority to do any of the enumerated actions without the written consent or ratification of the specific act by all of the limited partners.

132 CAL. CORP. CODE § 15712(c) (West 1998).

(b) any act which would make it impossible to carry on the ordinary business of the partnership (which would include a sale of substantially all of the assets of the partnership);

(c) confession of a judgment against the partnership;

(d) possession of partnership property, or assignment of the general partner's rights in specific partnership property, for other than a partnership purpose;

(e) admission of a person as a general partner;

(f) admission of a person as a limited partner except as permitted in the long-form certificate of limited partnership; or

(9) continuation of the business with partnership property on the death, retirement, or insanity of a general partner except as permitted in the longform certificate of limited partnership.

Section 15509(l) of the Original Act specifically states that the limited partners may consent to or ratify the act.

Counsel should use care in relying on an advance authorization of any of the foregoing actions contained in the partnership agreement. Section 15509(l) of the Original Act cautions that the limited partnership must consent to or ratify the "specific" act. Thus, there could be a significant question as to the effectiveness of any broad or vague consent given significantly in advance of the transaction.

Investigation. Counsel normally first determines whether the partnership agreement specifically authorizes the contemplated transaction. Specific authorizations that relate to the creation of the business of a partnership are common. For example, a partnership formed for the purpose of acquiring specific real property normally specifically authorizes the purchase of the property, although the authorization may be subject to conditions. Counsel may conclude that the transaction has been authorized in the partnership agreement if the authorization is sufficiently clear and counsel determines, through receipt of a certificate of one or more of the partners or otherwise, that all relevant conditions have been satisfied.

If the limited partnership is governed by the Original Act, counsel also reviews the "long-form" certificate of limited partnership originally recorded pursuant to the Original Act. Section 15712(c) provides that the longform certificate of limited partnership continues to be effective "[to the extent that the provisions of the certificate ... governed the rights and obligations of the partners and the limited partnership among each other" even if (subject to certain exceptions) the partnership has elected to be governed by the Revised Act.

If the transaction involves a general partnership governed by RUPA, counsel reviews any statements of authority, denial, dissociation, and dissolution filed with the California Secretary of State. See the discussion of the effect of such statements set forth under Section III.B. 1. - Investigation, *ante*.

If the transaction involves a disposition or encumbrance of real property by a general partnership governed by or formed under CUPA, counsel normally also reviews the statement of partnership recorded in the county records pursuant to Section 15010.5 of CUPA and any statements contesting the statement of partnership recorded in the county records pursuant to Section 15010.5. A statement of partnership may restrict the power of individual partners to convey partnership real property.[133]

If the transaction involves a disposition or encumbrance of real property by a limited partnership, counsel normally also reviews the certificate of limited partnership recorded pursuant to Section 15621(d) of the Revised Act. Section 15621(d) of the Revised Act provides that the recording creates the same presumptions as set forth in Section 15010.5 of CUPA. [134]

133 CAL. CORP. CODE § 15101.7 (West 1998) (repealed effective January 1, 1999).

134 It is not clear whether a restriction on the authority of a general partner included on a certificate of limited partnership recorded pursuant to Section 15621 of the Revised Act is effective to put third parties on constructive notice of the restriction. Section 15621 of the Revised Act states that recordation creates the same presumptions as provided in Section 15101.5 of CUPA (repealed effective January 1, 1999). It is Section 15101.7 of CUPA (repealed effective January 1, 1999), however, that provides for constructive notice of the contents of a restriction on the authority of individual partners to convey interests in real estate.

Section 15712(b)(2) of the Revised Act provides that no person may rely on a certificate of limited partnership filed pursuant to the Original Act once the limited partnership has filed a certificate of limited partnership with the Secretary of State as required by Section 15712(b)(2) of the Revised Act.

Separate Approval by the Partners. Counsel normally obtains or reviews a separate authorization of the partners under the following circumstances:

(a) the [limited] partnership agreement does not authorize the transaction;

(b) the transaction is different from an authorization contained in the [limited] partnership agreement in some material respect;

(c) the [limited] partnership agreement affirmatively prohibits or restricts the transaction;

(d) the [limited] partnership agreement requires a separate approval of the partners;

(e) the transaction appears to conflict with a statement filed or recorded by the partnership as permitted by applicable law.[135]

If counsel knows that the partnership agreement has been amended to authorize the specific transaction, counsel normally determines that the amendment procedures set forth in the partnership agreement have been followed. Counsel does not normally rely on an amendment to a provision that required a particular percentage vote unless the votes to amend represented a greater percentage of the outstanding votes than the percentage set forth in the applicable provision.

Regardless of any provision in the partnership agreement of a general partnership to the contrary, an agreement is duly authorized by the partners of a general partnership if all of the partners sign the transaction documents.

(d) Ascertaining the Governing Act

Is the Limited Partnership Governed By the Original Act? Limited partnerships are not governed by the Original Act merely because the limited partnership agreement is dated before July 1, 1984. The limited partnership will be governed by the Revised Act if the partners have elected to be governed by the Revised Act or if the limited partnership was not properly formed under the Original Act but subsequently filed a certificate of limited partnership with the Secretary of State under the Revised Act.

Election to be Governed by the Revised Act. An election to be governed by the Revised Act must be in writing and must have been made by all of the partners unless the limited partnership agreement specified that the election could be made by a lesser number of partners. 116 It is not clear what result follows if the limited partnership agreement permits amendment by less than unanimous vote and the partners vote to amend the agreement to provide that the Revised Act will govern. Counsel normally relies on a certified"' copy of the written election to conclude that the partners have elected to be governed by the Revised Act. If the election was less than unanimous, the certificate should recite facts sufficient to permit counsel to determine whether the required vote was obtained.

Long-form Certificate of Limited Partnership. It is sometimes easier to analyze the authorization of the transaction under both the Original Act and the Revised Act than it is to determine whether a limited partnership formed before July 1, 1984 was properly or improperly formed. To determine whether a limited partnership was properly formed under the Original Act, counsel compares the initial version of the limited partnership agreement against the long-form certificate of limited partnership recorded with the recorder of the county in which the principal place of business of the partnership is situated. The long-form certificate of limited partnership must describe fifteen aspects of the partnership agreement enumerated in Section 15502 of the Original Act and must have been signed by all the partners. Counsel may conclude that the limited partnership was properly formed under the Original Act if the long-form certificate of limited partnership was recorded in the correct county and substantially complies with Section 15502."'

135 CAL. CORP. CODE §§ 15101.5 (repealed effective January 1, 1999), 15621 (d), and 16105 (West 1998).

136 CAL. CORP. CODE § 15712(b)(1) (West 1998).

137 In this case, certified by one or more of the general partners as being true and complete, rather than certified by the Secretary of State.

138 CAL. CORP. CODE § 15502(2) (West 1998).

(e) Assumptions.

In rendering a due-authorization-of-the-agreement opinion, unless the parties agree otherwise, the opinion giver is entitled to rely on the assumption set forth below. This assumption is in addition to other assumptions, such as the validity of signatures, which also apply in other contexts.[139] This assumption is not normally expressly stated in the written opinion letter. The assumption is:

> Any partners that are entities have taken whatever internal entity procedures (such as board or partner approval) as are necessary to enable them to act on behalf of the [limited] partnership.

Any opinion as to the due authorization of the representatives of a general partner that is an entity to enter into the agreement on behalf of the [limited] partnership should be separately requested. Any such opinion is normally rendered, if at all, by the counsel that normally represents that general partner.

(f) Exclusion of the Arbitration Clause.

Before the enactment of RUPA, unless counsel was satisfied that all of the partners of a general partnership or all of the general partners of a limited partnership had authorized the [limited] partnership to be bound by an arbitration provision, either in the partnership agreement or by a separate action, counsel should normally have excluded any arbitration provision contained in a transaction document from any opinion concerning due authorization or the enforceability of remedies. Such an exception could have read as follows:

> We render no opinion with respect to the authorization of the [limited] partnership to enter into, or with respect to the enforceability of, any agreement to submit a partnership claim or liability to arbitration or reference in light of Sections 15006(2), 15009(3)(e), and [15509(l) or 15643(a) and 15722] of the California Corporations Code.

Notwithstanding the foregoing, the Committee does not believe that it has been the prevailing practice in California to expressly take such an exception to the due authorization of an agreement containing an arbitration provision.

The foregoing exception is not appropriate with respect to a partnership (whether general or limited) governed by RUPA. RUPA does not restrict the power of the general partners to submit a matter to arbitration; in fact, Section 16803(c) of RUPA specifically authorizes persons winding up the affairs of the partnership to 11 settle disputes by mediation or arbitration." The exception is appropriate for opinions concerning partnerships (whether general or limited) that are governed by CUPA.

(g) Spousal Consent Not Required

Unless the partnership agreement provides otherwise, the consent of a partner's spouse is not required with respect to any partnership transaction, even if that transaction could affect a partnership interest that is community property. CUPA provides that the property rights of a partner are (a) the partner's rights in specific partnership property; (b) the partner's interest in the partnership; and (c) the partner's right to participate in management.[140]RUPA provides that a partners' interest in the partnership means "all of a partner's interests in the partnership, including the partner's transferable interest and all management and other rights."[141]CUPA states that a partner's right in specific partnership property is not community property.[142] RUPA states that "A partner is not a co-owner of partnership property and has no interest in partnership property that can be transferred, either voluntarily or involuntarily."[143] CUPA states that a partner's interest in a partnership is personal property. RUPA states that a partner's transferable interest in a partnership is personal property.[145] With a few exceptions not normally relevant to partnership situations, either spouse may dispose of community personal property. [146] Moreover, a spouse has no power of disposition

139 For a discussion of the use of express and implicit assumptions in opinion letters, see Corporations Report pp. 17-19 and Accord § 4.
140 CAL. CORP. CODE § 15024 (West 1998) (repealed effective January 1, 1999).
141 CAL. CORP. CODE § 16101(10) (West 1998).
142 CAL. CORP. CODE § 15025(e) (West 1998) (repealed effective January 1, 1999).
143 CAL. CORP. CODE § 16501 (West 1998).
144 CAL. CORP. CODE § 15026 (West 1998) (repealed effective January 1, 1999).
145 CAL. CORP. CODE § 16502 (West 1998).
146 CAL. FAM. CODE § 11000 (a) (West Special Pamphlet 1994).

over an interest in a business which the other spouse is operating or managing.[147] While a partner may have an obligation to give prior written notice to his or her spouse before disposing of the business or interest, failure to do so will not invalidate the transfer. [148]

2. Due Execution.

The phrase "duly executed" refers to the authorization of the partners who have signed the documents on behalf of the [limited] partnership and the validity of their signatures (often assumed elsewhere in the body of the opinion). If the partnership authorization relates to the office a person holds rather than the person individually, the opinion also refers to the incumbency of that person.[149]

The authorization of a specific person to execute partnership documents is determined in the same manner as the authority of the partnership to enter into the agreement. See the discussion regarding due authorization above.

Often the partnership actions taken to authorize a specific transaction will include an authorization of specific persons to execute and deliver documents on behalf of the [limited] partnership. If the partnership agreement authorizes the transaction, the partnership agreement will frequently also indicate which partners are authorized to sign the documents needed to take the action. If the person taking the action on behalf of the partnership is not a partner and is not authorized to take the action in the partnership agreement, the partnership agreement will frequently authorize a general partner to appoint an agent who is authorized to sign the documents needed to take the action.

The partnership will be bound by the act of any general partner if the transaction itself has been duly authorized.[150]

In rendering a due-execution opinion, unless the parties agree otherwise, the opinion giver is entitled to rely on the assumption set forth below. This assumption Is in addition to other assumptions, such as the validity of signatures, which also apply in other contexts.[151] This assumption is not normally expressly stated in the written opinion letter. The assumption is:

> Any partners that are entities have taken whatever internal entity procedures (such as board or partner approval) as are necessary to enable them to act on behalf of the [limited] partnership.

Any opinion as to the due authorization of the representatives of a general partner that is an entity to enter into the agreement on behalf of the [limited] partnership should be separately requested. Any such opinion is normally rendered, if at all, by the counsel that represents that general partner.

3. Due Delivery.

"Duly delivered" means that the partnership has delivered the agreement to the other party or parties to the transaction to create a binding contract. To give an opinion that a document has been duly delivered, counsel should be present at the delivery or be otherwise satisfied as to delivery.

CONCLUSION

The Committee has endeavored to provide some general assistance to California lawyers in the preparation of legal opinions involving California general and limited partnerships in sale and financing transactions. For the lawyer not regularly engaged in such transactions, this commentary, when combined with the Corporations Report, the ABA Report, and the California Report, should provide a greater understanding of the procedures lawyers follow when requesting and rendering such opinions. For the experienced business lawyer, the Committee has attempted to provide a readily available reference and checklist for issues and problems routinely encountered in rendering such opinions.

147 CAL. FAM. CODE § 11000(d) (West Special Pamphlet 1994).

148 Id.

149 For a discussion of due authorization of actions on the part of a corporation, see Corporations Report, § V.11.3.

150 CAL. CORP. CODE §§ 15009 (repealed effective January 1, 1999) (general partnerships), 15509 (Original Act limited partnerships), 15643(a) (Revised Act limited partnerships), and 16301(2) (general partnerships) (West 1998). It is not clear whether a restriction on the authority of a general partner included on a certificate of limited partnership recorded pursuant to Section 15621 of the Revised Act is effective to put third parties on constructive notice ofthe restriction. Section 15621 of the Revised Act states that recordation creates the same presumptions as provided in Section 15010.5 of CUPA (repealed effective January 1, 1999). It is Section 15010.7 of CUPA (repealed effective January 1, 1999), however, that provides for constructive notice of the contents of a restriction on the authority of individual partners to convey interests in real estate.

151 For a discussion of the use of express and implicit assumptions in opinion letters, see Corporations Report pp. 17-19 and Accord § 4.

APPENDIX A

SELECTED CASES CONCERNING LIABILITY FOR OPINIONS REGARDING PARTNERSHIPS, OR IN WHICH SUCH ISSUES ARE RAISED

Andreo v. Friedlander, Gaines, Cohen, et al., 660 E Supp. 1362 (D. Conn. 1987).

Stevens v. Equidyne Extractive Industries, et al., 694 E Supp. 1057 (S.D.N.Y. 1988).

The United Bank ofKuwalt PLC v. Eventure Energy, et al., 755 F. Supp. 1195 (S.D.N.Y. 1989).

Roberts v. Ball, Hunt, Hart, Brown 6- Baerwitz, 57 Cal. App. 3d 104, 128 Cal. Rptr. 901 (1976).

APPENDIX B

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